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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 442

ELIZABETH L. CONRAD,
PETITIONER,

v.

GRAF BROS. INC., ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Elizabeth L. Conrad, petitions the Supreme Court of the United States to issue a writ of certiorari to review the judgment entered by the Circuit Court of Appeals, First Circuit, on June 20, 1969, not as yet reported, copy attached, reversing a judgment of the District Court entered on April 29, 1968, in favor of Elizabeth Conrad on a verdict of Sixty eight thousand six hundred ($68,600.00) dollars in an action of tort for personal injuries.

Opinion Below

The date of the judgment sought to be reviewed is June 20, 1969. Petition for rehearing was filed on July 1, 1969 and denied on July 9, 1969. On June 27, 1969, the Court entered an order to stay its mandate, application for writ of certiorari to the Supreme Court of the United States to be filed by August 11, 1969.

Jurisdiction

Jurisdiction of this Court to issue this writ to review the judgment of the Court of Appeals is provided by U. S. Code Title 28, Sect. 1254 (1).

Question Presented

The question presented for review is correctness of the ruling of the Court of Appeals that it had the right, on the record of the facts, to review and overturn as an abuse of discretion, the order of the district judge, who presided at the trial, denying motion of defendant for a new trial on the grounds of newly discovered medical evidence not available at trial by use of reasonable diligence, and to grant defendant a new trial, restricted, however, to the issue of damages.

Statement of Case

The Court of Appeals found an abuse of discretion in the denial by the trial judge of defendant's motion for new trial for newly discovered evidence that in the opinion of the said court was (a) material and (b) not available to defendant at the trial by use of reasonable diligence. (c) The Court also brought into its opinion an assertion that plaintiff had not complied with pretrial orders, made

on motions of defendant, for complete production of Portsmouth Naval Hospital records.

The evidential matter which was of concern to the Court of Appeals was the following:

Plaintiff originally — 1963 — had trauma, to her head and neck, and a whiplash injury to her neck. A cancer condition of the thyroid was detected in the Chelsea (Boston, Mass.) Naval Hospital in May of 1965 and an operation was performed. An expert on cancer testified that the tumor grew more rapidly and involved the tissue in which it grew more rapidly than it would have had the accident not occurred. (Pages 381, 382) She transferred to the Portsmouth (Virginia) Naval Hospital June 25, 1965 and was there followed and treated for control of the thyroid cancer condition. Defendant knew of this condition and treatment in 1966, 1967 and by March 26, 1968, and before. Well before the trial defendant had received effective, intelligent records of the Portsmouth Naval Hospital.

At the trial, plaintiff testified to residual neck pain and to the fact of wearing a Thomas Collar up to and during the time of trial. Defendant complains that complete records of Portsmouth would have shown evidence, negative in character, that she did not complain to the thyroid treatment doctors and other doctors for assorted complaints, urticaria and a stubbed toe amongst others, of continuing effects of the original traumatic neck injury, would have shown absence of reference to use of a Thomas Collar, would have provided basis for material cross-examination of plaintiff and of an expert produced by her to testify to the permanent effects of the original trauma, and would have shown a negative record as to presence of residuals of the original neck injury.

Jurisdiction to issue the writ of certiorari, and compelling reasons for issuance, are (a) That the decision of the Court of Appeals is radically in conflict with the position of this

Court that the Appeals Court does not have the function to decide factual issues unless the District Court finding is clearly erroneous, *Zenith* v. *Hazeltine,* United States Supreme Court, Advance Opinions, May 19, 1969, p. 20; (b) On a fair and correct analysis of the record, this case is one where the Court of Appeals has rendered a decision which is in conflict with the decision of other Circuit Courts of Appeal on the same subject matter; (c) The Court of Appeals has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of power of supervision possessed by this Court.

a. A number of factual issues were necessarily present in the submission and argument of defendant's motion for new trial. (a) Had plaintiff complied with orders for production of the Portsmouth Naval Hospital records; (b) Was the evidence of the records as the defendant developed them on the new trial motion, fairly open to defendant for use at the trial by use of reasonable diligence; (c) Did plaintiff's counsel mislead the Court and the defendants as to efforts to obtain Portsmouth records where he had issued April 15 and caused to be served by April 22 subpoena for hospital records on the Department of the Navy, JAG Office, Exh. 9, Vol. III, Page 793.

Records of the Portsmouth Hospital had been made available to the defendant in 1966 and 1967 PO 1A P.894, as they currently developed. Exhibit 9 OP 1B P.895, letter of March 21, 1968. Delivery to defendant thereof was factually contested at hearing on new trial motion. See Page 29 of record on this hearing. Defendant's Derby affidavit showed ability of defendant to go directly to the hospital for information. Vol. 1, Page 39. The decision of the trial judge to deny the defendant's motion necessarily involved a decision adverse to defendant on the facts needed by defendant to prevail.

The trial judge well could have decided that plaintiff

had in good faith attempted to supply defendant with complete records, that defendant had not sought delay in trial, as in fact it had not, that the new material, so far as it was new, could have been had by the defendant at the trial by use of reasonable diligence, and that counsel had not misrepresented efforts to obtain the record where he had caused service of the subpoenas referred to in Exhibit 9, Page 793.

The action of the Court of Appeals necessarily reverses such findings of fact and this reversal of fact findings is in conflict with and palpably erroneous under the principles of *Zenith* v. *Hazeltine,* U.S. Supreme Court, Advance Opinions, May 19, 1969 P. 20.

b. The second reason for issuance of the Writ of Certiorari to the Court of Appeals is that the decision of that Court, on the facts presented by the record, is a decision of law that the Trial Court committed a reviewable abuse of discretion in denying new trial even though the evidence which defendant says was newly discovered after trial was in truth *evidence which it could have had at the trial itself by the use of reasonable diligence.*

i. The defendant knew the plaintiff had been extensively treated at Portsmouth. Defendant's affidavit of Derby, Vol. I, P. 39, 40, shows that on April 30, 1968, Derby was able to go directly to the Portsmouth Hospital, consult with the authorities and determine that the record consisted of thirty to forty pages dated in the years, 1966, 1967, and 1968 and related to various physical conditions. Defendants could have done the same at any time in 1968 *before trial* and would have been warned that the records received from plaintiff (believed by the plaintiff to be complete) were in fact lacking in material of some extent and character.

Defendant then would have been in position to apply for trial delay if so minded.

ii. Defendant could have taken the deposition of the Portsmouth Authorities and in that manner could have determined the entire contents of the records of the plaintiff, Elizabeth Conrad. See *Munzer* v. *Swedish Line,* 35 Fed. Supp. 493. See *Butts* v. *Sears Roebuck & Co.,* U.S. Dist. Ct., Dist. of Col., April 27, 1949, 12 Fed. Rules Service, 35(b)(2) Case.

iii. Records of the Portsmouth and Chelsea Naval Hospitals came to court in response to subpoena. This is convincing proof that if defendant had issued subpoenas in time the entire records of Elizabeth Conrad would have come to Court *before trial* for such use as defendant might choose, rather than after trial, when defendant could speculate as to their use before the jury rather than take the actual risk of use.

In addition to the Portsmouth Hospital records had by the defendant in April of 1966, and 31 March 1967, page 894 defendants were adequately warned of extensive treatment of Elizabeth Conrad by contents of the deposition of the husband, Robert, taken by defendant on August 4, 1967 in which deposition the husband testified that up to that time his wife had never regained her previous healthy condition; that she was taking thyroid pills, hormone pills, pain pills and nerve pills. She was under treatment down in Portsmouth; she had been to the Portsmouth Naval Hospital the prior week for a check up; that she was going to the thyroid clinic every three months; that she was using traction on her neck 3-4 times a week. This deposition was made a supplemental part of the record by order of the Appeals Court on May 22, 1969.

In view of the foregoing, there is conclusive factual evidence, statutory procedure, and case law that the contro-

verted material was available to defendant for use at trial by the exercise of reasonable diligence. Therefore, notwithstanding lip service rendered by the Court of Appeals to the standard rule of the Circuits, the Court of Appeals has actually rendered a decision that a party should have a new trial for the use of newly discovered evidence even though such evidence clearly could have been had at the trial by exercise of even minimal diligence. The Court of Appeals goes so far as to substitute its discretion for that of the trial judge, who heard all evidence and all contentions at the motion for new trial, and was in far better position to determine questions of fact, all of which were decided adversely to defendant.

The sound and well established rule of other circuits is that a new trial for newly discovered evidence is not to be granted where such evidence could have been introduced at the trial by the exercise of reasonable diligence. *King* v. *Leach*, 131 F2nd 8; *Titcomb* v. *Norton Co.*, 307 F2nd 253; *Roach* v. *Stasny*, 104 F.2nd 559; *Rome Grader etc. Co.* v. *J. D. Adams Mfg. Co.*, 135 F.2nd 617.

c. The Circuit Court of Appeals has departed from the accepted and usual course of judicial proceeding to an extent that requires exercise of supervision.

In at least three factual situations which are clearly disclosed on the record, the Court has placed the burden of proof on Appellee, Elizabeth Conrad, rather than on defendants, appellants in the Court below.

This is contrary to the fundamental rule that a party alleging error has to prove the error.

(i) In its opinion, the Court referred to, and seemingly, indeed in effect, adopted as correct a claim of defendants that over protest the district court required the defendants to go to trial without production of the complete Portsmouth records.

Trial in the District Court began on April 16, 1968.

The docket entries up to that date, and after that date do not show any motion for continuance on that ground. The verbatim transcript of proceedings when the case was called for trial do not disclose in any way, shape or manner any such protest, no request for continuance or postponement of trial on such a ground was made. The appeals court in effect put on the plaintiff the burden of proving a negative, that no such request was made.

On the motion for new trial, Page 8, defendant "Supplemental Exhibit", defendant's counsel refers to sudden notice of the case coming on for trial, "we objected to the case going on the following Monday because we had never been supplied with those records . . ." This claim is not substantiated by any portion of the record. Defense counsel did not file a supporting affidavit in this respect.

(ii) The Court refers to an assertion by plaintiff counsel that the entire Portsmouth record had been supplied to the defendants.

The Court below concedes that a certain "letter" from the Portsmouth Hospital, dated March 21, 1968, had been duly made available to defendants. The Court rejected the status of the letter as part of the hospital record. Plaintiff is not responsible for the manner in which the Navy Department makes up its hospital records.

The Court below also concedes that defendants had been furnished portions of the Portsmouth Record.

It is the fact that pages of the record, as produced in Court on the new trial motion in response to plaintiff's subpoena (for the trial), were not included in the material furnished to defendant.

This does not mean that plaintiff had failed in her duty. It should mean no more than that plaintiff sent along to defendants the material she received.

Defendant's chart, supplemental Appendix 1, 2, 3, had a listing of pages "missing" at the trial. Defendant did not submit any affidavit that it never inspected "such

"missing" papers prior to trial. The pages were not "missing" except only in the sense that they had not theretofore been supplied.

Defendant's principal affidavit in support of its motion for new trial was that of its claims representative, Derby. His letter of May 3, 1968 requested Kemp. Lt. Cmdr., MSC, to advise if the hospital had medical records of Elizabeth Conrad other than those attached. The letter did not specify what records were attached.

Defendant did not disclose what records it had in its possession at that time. Since defendant had the burden of proof, and failed utterly to meet the same, it cannot thereafter say that there were existing records it had not had the opportunity to inspect. The Court here, as elsewhere, has improperly transferred the burden to plaintiff.

The failure of disclosure by defendants in the above respect made it impossible to determine whether or not the records it did have were sufficient to enable it to meet the issue of damages to Elizabeth Conrad.

The burden of this situation should remain with the defendants. It is clearly unfair and a serious departure from ordinary judicial procedures to make plaintiff carry the burden of showing whether defendants had sufficient information from the records they did have.

In the record of the new trial motion, it will appear (P29) that plaintiff's counsel stoutly maintained that he had sent records to defense counsel as he (Mr. Kirk) received them (P29) Defense counsel never filed any affidavit to contradict the position of Mr. Kirk.

(iii) The Court took up plaintiff's contention that full records were never made available to them. Then it used a letter of Kemp, Lt. Cmdr., MCS, dated May 3, 1968 as the basis for a side blow at counsel's integrity. The Court quoted Kemp, replying to defendant's claims man, Derby, as saying "our records reveal that no request has

been received for these (additional) records in the last three weeks." This was an emphasis which was entirely unfair and completely off the mark. At the least the plaintiff was attempting to subpoena naval hospital records of Elizabeth Conrad. This appears from the letter of the Navy, JAG dated April 22, 1968, and received by the Clerk of the District Court on April 24, 1968, Vol. III p. 793. Plaintiff's attorney was making an effort. The contents of the letter, which was certainly open to defense counsel, were clearly enough to apprise him that by subpoena he had it in his power to produce in Court naval hospital records of Elizabeth Conrad.

The subpoena was addressed to the Secretary of the Navy in Washington, D. C., and this is demonstrated on Page 793 of the record. Of course, the Portsmouth Naval Hospital did not have the summons as it is the Secretary in Washington, D. C., that is summoned and in turn they authorize the records being forwarded to Court. Manual of the Judge Advocate General, Part III, Section 1320. Text attached. See page 19 of this Petition.

This was understood by the trial justice and he was satisfied at the hearing on the motion for new trial. But the Circuit Court of Appeals, which is not a trial court, did not understand the subpoena procedure and still does not as evidenced by its decision and reliance on Lt. Kemp's letter.

Conclusion

The Court should issue the Writ of Certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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Boston, Massachusetts

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7223.

ROBERT L. CONRAD ET AL.,
PLAINTIFFS, APPELLEES,
v.
GRAF BROS., INC. ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

Thomas B. Arnold, with whom *Andrew B. Goodspeed*, *J. Paul Paksarian* and *Epstein, Salloway & Kaplan* were on brief, for appellants.

James W. Kirk, with whom *Monto Rosenthal* was on brief, for appellees.

June 20, 1969.

McENTEE, *Circuit Judge*. This is an automobile accident case which resulted in sizable jury verdicts for two of the four plaintiffs. The principal question raised by defendants' appeal is whether the trial court abused its discretion in refusing to grant a new trial on the issue of damages.

About 6:30 a.m. on October 18, 1963, plaintiffs Robert Conrad, a boatswain's mate in the Navy, and his wife Elizabeth were driving from Peabody, Massachusetts, toward Boston. Conrad was at the wheel and his wife was beside him in the right front seat. They had just driven through the Saugus traffic rotary and were heading south

on Route C-1 when they saw the plaintiff Bonnette, a sailor, standing on the right hand curb about fifty feet south of the rotary hitch-hiking. Conrad brought the car to the curb about fifteen or twenty feet past Bonnette. Mrs. Conrad opened her door and pulled the seat forward so that he could get into the back seat. During this interval a truck owned by the defendant Domingos, came up behind the Conrad car and stopped. Just as Bonnette was getting into the car a tractor-trailer, owned by the defendant Graf Brothers, slammed into the Domingos truck pushing it into the rear of the Conrad car. The force of the impact propelled the Conrad car forward a distance of some seventy-five feet.

After a seven day trial the jury returned verdicts for all of the plaintiffs. The principal verdicts were in the amounts of $68,600 for Elizabeth Conrad and $38,500 for Bonnette.[1] In their original motion for new trial the defendants did not challenge the award to Bonnette. Several weeks later, however, they attempted to amend their motion to include the counts relating to him. This belated attempt was properly denied by the district court as untimely. Fed.R.Civ.P.59(b). Consequently we shall confine our discussion of this aspect of the case to the verdict in favor of Elizabeth Conrad.

Following the accident Mrs. Conrad was taken to the Saugus Hospital and then to the Chelsea Naval Hospital, from which she was released the same day. On two subsequent occasions she was hospitalized at the Josiah B. Thomas Hospital in Peabody, Massachusetts, for treatment of the injuries sustained in the accident. Following her first stay there she noticed a lump on her neck which

[1] Robert Conrad was awarded $910.85 in consequential damages, and the United States, which intervened as a plaintiff, was awarded $3,912.50 for medical treatment rendered to Mrs. Conrad and Lester Bonnette. On appeal, these two amounts are not challenged as excessive.

was later diagnosed as cancerous. This growth which was not caused by the accident was removed by surgery at the Chelsea Naval Hospital in May 1965. Thereafter the Conrads moved to Norfolk, Virginia where Mrs. Conrad underwent numerous cobalt treatments at the Portsmouth Naval Hospital in Portsmouth, Virginia.

On April 29, 1966, some two years prior to trial, the defendants filed a motion for production of documents under Fed.R.Civ.P. 34. Among the records requested was the "Entire record of Portsmouth Naval Hospital . . . with reference to plaintiff, Elizabeth Conrad." On August 15, 1966, the court ordered production of these records. About a year later the defendants moved for the production, inter alia, of any and all such records of the Portsmouth Naval Hospital with reference to Elizabeth Conrad subsequent to August 6, 1965, which motion was granted on September 11, 1967. Defendants allege that plaintiffs at trial, which was held on April 16-25, 1968, did not produce full and complete copies of the Portsmouth Hospital records as ordered and that plaintiffs' counsel misrepresented his efforts to obtain them. Also, that over protest the district court required the defendants to proceed with trial without the complete Portsmouth Hospital records. Specifically, defendants claim that these missing records, which were not produced until about a month after the trial had concluded, indicated that although Mrs. Conrad had complained at various times about a variety of ailments, never during the course of her treatment at the Portsmouth Hospital did she ever complain or give a history of the injuries allegedly received in the accident which she stated at trial were still bothering her;[2] furthermore, that according to these records the examinations

[2] For example, the record does not indicate that Mrs. Conrad made any complaint about her neck, yet at trial she testified she had pain, "awful headaches," and had to wear a Thomas collar six to eight hours a day.

made at the hospital revealed no evidence of the disabilities which Mrs. Conrad claimed still continued up to the time of trial. They also complain that plaintiffs' medical expert did not consider these Portsmouth records before giving his opinion and that if he had, his opinion might well have been different. In other words, defendants contend that their rights were substantially prejudiced by plaintiffs' failure to produce these records at trial.

In reply, plaintiffs assert that defendants in fact had the entire Portsmouth Hospital record at the time of trial as evidenced by certain questions asked in cross-examination. In none of the opportunities given to the plaintiffs to document their contention were they able to do so.[3] It would serve no useful purpose to recite all the references in the record upon which plaintiffs rely. Two typical examples will suffice.

First, plaintiffs' counsel refers to defendants' cross-examination of Dr. Clancy. The questioning involved a document dated April 26, 1965, entitled "Radiation Therapy Summary" and numbered p. 726 of the record appendix. There can be no doubt that this summary was part of the Portsmouth Hospital records. Plaintiffs claim that this proves that the disputed records were in defendants' possession at the time of trial. But reference to defendants' chart showing which pages of the Portsmouth Hospital records were not produced does not include p. 726. Second, during the cross-examination of Mrs. Conrad, defendants' counsel asked questions based on a "rec-

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[3] During oral argument plaintiffs had at least two opportunities to substantiate their contention. This appeal was heard originally at our March 1969 sitting. When it became apparent that plaintiffs' counsel was not prepared to document his contention from the record, we continued the case to our April sitting to afford him further opportunity to do so. Also, because of the seriousness of the defendants' charges, we permitted plaintiffs to file a reply brief and supplemental record appendix.

ord" dated March 21, 1968, in evidence as a plaintiffs' exhibit. This was a "To whom it may concern" letter over the signature of the Executive Secretary of the Tumor Board at the Portsmouth Naval Hospital stating that Mrs. Conrad was last examined there on January 8, 1968. From this plaintiffs conclude that the defendants must have had the Portsmouth Naval Hospital records up to that date. But here again defendants do not claim that this was part of the missing records. Moreover, it does not appear to be a record at all in the sense that this term has been used during the trial. Obviously it was a solicited letter stating that as of January 8, 1968, there was no evidence of recurrence of the cancer of the neck. From our examination of these and other record references submitted to us by plaintiffs, we cannot say that they substantiated their position that they had made available all the Portsmouth Hospital records relating to Elizabeth Conrad at the time of trial.

Alternatively, plaintiffs argue that the full records were never made available to them, thus attempting to shift the blame for the missing records to the Navy. But defendants point to a letter set forth below in the margin[4] which would tend to refute this. We think plaintiffs have the burden of showing that this letter means something

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[4]

Mr. Dean S. Derby, Jr.
Claims Representative
Norfolk Service Office
P. O. Box 12298
Norfolk, Virginia 23502

"3 May 1968

Re: Elizabeth Conrad

Dear Mr. Derby:

Additional medical records in the case of Elizabeth Conrad are available at this facility.

Our records reveal that no request has been received for these records in the past three weeks. On 18 April 1966 a true and

other than its plain language indicates. They have not done so.

Plaintiffs also argue that even if the defendants' allegations are taken as true, the hospital records in question do not fit within the principles of *Johnson* v. *United States*, 32 F.2d 127, 130 (8th Cir. 1929), as to newly discovered evidence.[5] They specifically emphasize that the defendants were not diligent in procuring this evidence. This argument does not impress us. The motions to procure the hospital records were made and granted well in advance of trial. Moreover, defendants were not in a position to obtain these out of state documents on their own.[6] Nor are we persuaded by the argument that some of the pages of the Portsmouth record were merely cumu-

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exact copy of the medical records of Elizabeth Conrad were furnished to Triant and Kirk, 201 Old South Building, 294 Washington Street, Boston, Mass. 02108.

Very truly yours,
J. E. KEMP
Lieutenant Commander
Medical Service Corps
U. S. Navy
Chief, Patient Affairs
Division
By Direction of the Commanding Officer"

[5] In *Johnson* the court stated that the following verities must be present and concur in order to obtain a new trial on the ground of newly discovered evidence:

"(a) The evidence must be in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) The evidence relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal."

Although *Johnson* is a criminal case, we note that the rule is the same in civil cases. *Kansas City S. Ry.* v. *Cagle*, 229 F.2d 12, 15 (10th Cir.), *cert. denied*, 351 U.S. 908 (1956).

[6] During the trial itself plaintiffs' counsel assured them that he was doing everything in his power to obtain the records.

3. The Office of the Comptroller of the Navy;

4. Procurement matters in the field of patents, inventions, trademarks, copyrights, royalty payments, and similar matters, including those in the Armed Services Procurement Regulation and Navy Procurement Directives and deviations therefrom, and

5. Industrial security.

d. Initial and supplemental reports. If all pertinent information is not readily available, a prompt report should be made with such information as is available, supplemented by an additional report as soon as possible.

PART III

PRODUCTION OF OFFICIAL RECORDS

1320 PRODUCTION OF OFFICIAL RECORDS IN RESPONSE TO COURT ORDER

a. General. Except as noted in subsection b, in cases where naval records are desired by or on behalf of litigants and where the records are not classified or of a privileged and confidential status as described in Article 1251, Navy Regulations, such parties will be informed that the procedure for the production of the records desired or certified copies thereof is to obtain and forward to the Secretary of the Navy, Navy Department, Washington, D. C., or other custodian of the records, a court order calling for the particular records desired or copies thereof. Compliance with such court orders, after authorization where litigation is pending, without procuring specific authority from the Secretary of the Navy. Where travel is involved, it must be without expense to the Government or to the person producing the records.

c. Medical and other records of civilian employees. Production of medical certificates or other medical reports concerning civilian employees is controlled by the provisions of Executive Order 10561, 19 F.R. 5963, as implemented by Federal Personnel Manual, section 339.1-4 (reprinted in MANMED article 23-255(6)). Records of civilian employees other than medical records may be produced upon receipt of a court order without procuring specific authority from the Secretary of the Navy provided there is not involved any classified or otherwise con-

3. The Office of the Comptroller of the Navy;

4. Procurement matters in the field of patents, inventions, trademarks, copyrights, royalty payments, and similar matters, including those in the Armed Services Procurement Regulation and Navy Procurement Directives and deviations therefrom, and

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PART III

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a. General. Except as noted in subsection b, in cases where naval records are desired by or on behalf of litigants and where the records are not classified or of a privileged and confidential status as described in Article 1251, Navy Regulations, such parties will be informed that the procedure for the production of the records desired or certified copies thereof is to obtain and forward to the Secretary of the Navy, Navy Department, Washington, D. C., or other custodian of the records, a court order calling for the particular records desired or copies thereof. Compliance with such court orders, after authorization by the Secretary of the Navy or his designee, will be effected by transmitting certified copies of the records to the clerk of the court out of which the process issues or by production of the original records by naval custodian where necessary. Where an original record is produced, it will not be removed from the custody of the person producing it; but copies may be placed in evidence in the case. Upon the written request of all parties in interest or their counsel, records which would be produced in response to a court order as set forth above may be furnished without court order.

b. Exceptions. Where not in conflict with the foregoing restrictions relative to confidential matter, the production in Federal, State, Territorial, or local courts of the service, employment, pay, or medical records (including medical records of dependents) of persons in the naval service is authorized upon receipt of a court order, where litigation is pending, without procuring specific authority from the Secretary of the Navy. Where travel is involved, it must be without expense to the Government or to the person producing the records.

c. Medical and other records of civilian employees. Production of medical certificates or other medical reports concerning civilian employees is controlled by the provisions of Executive Order 10561, 19 F.R. 5963, as implemented by Federal Personnel Manual, section 339.1-4 (reprinted in MANMED article 23-255(6)). Records of civilian employees other than medical records may be produced upon receipt of a court order without procuring specific authority from the Secretary of the Navy provided there is not involved any classified or otherwise confidential material such as loyalty or security records. Records relating to compensation benefits administered by the Bureau of Employees' Compensation may not be disclosed except upon the written approval of the Bureau (20 CFR 1.21). Further, in any case of doubt, the matter should be handled in accordance with the general rule under subsection a. Where information is furnished hereunder in response to a court order, it is advisable that certified copies rather than originals be furnished and that, where original records are to be produced, the assistance of the U. S. Attorney or U. S. Marshal be requested so that custody of the records may be maintained.

1321 PRODUCTION OF OFFICIAL RECORDS IN THE ABSENCE OF COURT ORDER

a. Furnishing information from personnel and related records to personnel concerned.

A true copy: To the best of my knowledge in effect as of 1 January 1968 and still in effect as of this date, 6 August 1969.

ATTEST: JOHN F. DUNLAP
Lieutenant, JAGC, USNR

interest rests in the Attorney General. For the purpose of affording the Attorney General timely notice of legal actions arising out of operations of the Naval Establishment, the Judge Advocate General and the General Counsel maintain close liaison, within the areas of their respective jurisdictions, with the Department of Justice. Reports are required of all suits against the United States or its prime or subcontractors on contracts under which the Government may be obligated to make reimbursement or in cases where the United States is, in legal effect, the defendant.

b. Reports to the Judge Advocate General. When any command is apprised, by service of process or otherwise, of the commencement of any civil litigation or legal proceedings, including those involving nonappropriated-fund activities, other than suits within the jurisdiction of the General Counsel as set forth in subsection c below, which arise out of the operations of the Naval Establishment or are otherwise of substantial interest to it, such command will make a report direct to the Judge Advocate General, Navy Department, Washington, D. C., by the most expeditious means, using message, telephone, or letter, whichever appears warranted by the circumstances. This category of civil litigation and other legal proceedings includes, but is not limited to, any legal proceeding involving the United States as a party and arising out of operations of the Naval Establishment; proceedings against any person subject to military law or any official or employee of the Naval Establishment in connection with his public duties; and proceedings in which attachment of Government funds or other property is sought. The report will contain such of the following information as may be pertinent:

1. Name of parties to the proceeding.
2. Nature of the action.
3. Correct designation of the tribunal in which the proceeding is brought.
4. Docket number of case, if available.
5. Names of person or persons on whom service was made, method of service, and dates.
6. Explanation of Government's interest in the proceeding.
7. Date by which the defendant must plead or otherwise respond.
8. Nature of principal defense, if known.
9. Status of the defendant as being a Government officer, employee, or agent; a contractor, or a nonappropriated-fund-activity employee, etc.
10. Amount claimed, or other relief sought.
11. If a contractor is involved, the contract number, and information as to whether the contractor desires or is willing to permit the suit to be defended by a United States Attorney.
12. Data as to whether the subject matter of the suit is covered by insurance; if so, whether covered to the amount claimed, and whether the insurance carrier will accept full responsibility for the defense of the suit.
13. If action is brought in a foreign country, a recommendation as to qualified local attorneys, English-speaking if possible, available for retention to defend the interests of the United States. Normally the names of such attorneys should be from a list maintained by the U. S. Embassy or Consulate.
14. Such other available information as is necessary for a full understanding of the action and to enable the Government to prepare a defense.

c. Reports to the General Counsel. A report as required above will be made to the General Counsel, Navy Department, Washington, D. C., rather than to the Judge Advocate General, in all cases in the field of business and commercial law, including cases relating to:

1. The acquisition, custody, management, transportation, taxation, and disposition of real and personal property, and the procurement of services, including the fiscal, budgetary, and accounting aspects thereof; excepting, however, tort claims and admiralty claims arising independently of contract, matters concerning nonappropriated-fund activities, and matters relating to the Naval Petroleum Reserves.
2. Operations of the Military Sea Transportation Service, excepting tort and admiralty claims arising independently of contracts;

lative. A more perceptive analysis of the records in question reveals that they in fact contained significant new material.

As we held in *Hobart* v. *O'Brien*, 243 F.2d 735, 741 (1st Cir.), *cert. denied*, 355 U.S. 830 (1957), "[a] motion for new trial is addressed to the sound judicial discretion of the trial court and the action taken thereon is not open to review on appeal unless it appears that there was an abuse of such discretion." See also 6A J. Moore's Federal Practice ¶ 59.08[3] (2nd ed. 1966). Here the plaintiffs failed to comply with the orders of the court although they had ample time to do so. As the result of this failure we have little doubt that the defendants were substantially prejudiced in their efforts to deal with the issue of damages insofar as Elizabeth Conrad was concerned. For that reason we think that as to her the interests of justice would best be served by ordering a new trial on the question of damages.

Defendants also make several allegations of error regarding the instructions given to the jury but only one merits discussion, namely, that the trial court erred in its instruction that there was no issue as to contributory negligence on the part of Mrs. Conrad. Defendants argue that since the jury might have found her husband negligent in not foreseeing the danger of stopping to pick up Bonnette, it might also have found that his passenger had failed in her duty to warn him. See *Lambert* v. *Eastern Mass. St. Ry.*, 240 Mass. 495, 499, 134 N.E. 340, 341-42 (1922). Whatever may have been the force of this logic prior to submission of the case to the jury has disappeared with the jury's implicit exoneration of Conrad. As for defendants' further argument that the jury could have found that Mrs. Conrad's actions in opening the door and pulling her seat forward contributed to her injuries, we need say only that such a possible finding was not

covered by any requested instruction. We say this, however, without implying that a more specific instruction should have been granted if requested.

The judgment of the district court in the case of Elizabeth Conrad, as amended, is affirmed as to liability but vacated as to damages and the case is remanded for a new trial on the issue of damages only; the judgment is otherwise affirmed. The defendants-appellants recover costs on appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 442

ELIZABETH L. CONRAD,
PETITIONER,

v.

GRAF BROS. INC., ET AL.,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Supreme Court Rules

Rule 19 2

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Questions Presented

1. Does the Petition for Writ of Certiorari present special and important reasons for granting the Petition.

2. Is the decision of the Court of Appeals a final judgment which is ripe for review.

3. Does the Petition present any grounds for overturning the decision of the Court of Appeals.

Argument

I. The Petition For Writ Of Certiorari Should Be Denied Because It Presents No Significant Legal Issues.

The only question presented by this Petition for Writ of Certiorari is whether the Court of Appeals was correct in ordering a new trial on the issue of damages. The case does not raise Constitutional or other questions of Federal Law, nor does it involve any principle "the settlement of which is of importance to the public as distinguished from that of the parties..." *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 79; Rule 19, Supreme Court Rules. Only the private litigants are interested in the outcome of this case.

While in the past this Court has granted Certiorari where the decision of a jury in a personal injury suit has been overruled by a lower court, it has also distinguished sharply between statutory negligence actions and the "ordinary common-law negligence action." *Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 509-510. This case is an ordinary common-law negligence action. No facts make it different from the thousands of other personal injury cases which are brought in the Federal District Courts under their diversity of citizenship jurisdiction. The parties have had two opportunities to argue and brief the case at the appellate level. (Opinion of the United States Court of Appeals; P. 4, footnote 3.) There are no special or important reasons within the meaning of Rule 19, Supreme Court Rules, for this Court to grant the Petitioner a further hearing.

II. The Petition For Writ Of Certiorari Should Be Denied Because A Final Judgment Has Not Been Entered.

The Court of Appeals did not enter a final judgment in

this case. Rather, it affirmed the judgment as to liability but vacated the judgment as to damages and remanded the case for a new trial on the issue of damages only. (Opinion of the United States Court of Appeals, p. 8). When a Court of Appeals has remanded a case to the District Court for a new trial, this Court has uniformly stated that the case is not ripe for review and has denied the Petition for Certiorari. *Brotherhood of Locomotive Firemen and Engineers* v. *Bangor and Aroostook Railroad Co.*, 389 U.S. 327; *Slaker* v. *O'Connor*, 278 U.S. 188. Nor has this Court applied a different rule when a judgment for the plaintiff in a personal injury suit brought under the F.E.L.A. has been reversed and remanded for a new trial. *Banning* v. *Detroit, Toledo & Scranton R. Co.*, 173 F.2d 752, cert. denied 338 U.S. 815; *Dixon* v. *Atlantic Coast Line R. Co.*, 189 F.2d 525, cert. denied 342 U.S. 830; *Thomas* v. *Chesapeake & Ohio R. Co.*, 198 F.2d 783, cert. denied 344 U.S. 921; *Delaware, Lackawanna & Western R. Co.* v. *Siegrist*, 263 F.2d 616, cert. denied 360 U.S. 917; *Anderson* v. *Atlantic Coast Line R. Co.*, 267 F.2d 329, cert. denied 361 U.S. 841.

This case is not distinguishable from the cases cited above. There has been no final judgment entered and, therefore, the case presents no question for determination by this Court at this time.

III. The Petition For Writ Of Certiorari Should Be Denied Because The Court Of Appeals Correctly Decided The Issues Presented To It.

The Petitioner makes three arguments in support of her Petition:

1) the Court of Appeals has decided questions of fact and was in error to do so,

2) the Court of Appeals applied the wrong standard in deciding that the defendant did not use diligence in at-

tempting to obtain the missing Portsmouth Hospital Records,

3) the Court of Appeals placed the burden of proof upon the plaintiff on certain issues.

None of these arguments are supported by the record or the law.

1) The petitioner alleges that the Court of Appeals improperly decided certain questions of fact. But this Court has stated that the Court of Appeals may reverse findings of fact made by the trial court if "on all the evidence (it) is left with the definite and firm conviction that a mistake has been committed." *Zenith Radio Corp.* v. *Halzetine Research, Inc.*, 395 U.S. 100, 123. The Court of Appeals in this case stated that they had little doubt that the defendants were substantially prejudiced in dealing with the issue of damages by the failure of the plaintiffs to comply with the order of the court. (Opinion of the Court of Appeals, p. 7).

The following evidence supports the decision of the Court of Appeals. The Plaintiff's accident occurred on October 18, 1963. She received medical treatment only at the Portsmouth Naval Hospital, Portsmouth, Virginia from April, 1965 to April, 1968. (A. Vol. II, pp. 182-183). The complete Portsmouth Hospital record for this three-year period comprises 31 pages. (See Appendix A to this brief.) Of these, only 8 pages were introduced at the time of the trial by the plaintiff. (Appendix A to this brief.) The pages which were introduced cover the period April 28, 1965 — August 6, 1965. (Appendix A to this brief.) A copy of this portion of the hospital record was provided to the defendants at the time they were obtained by the plaintiff on April 18, 1966. Subsequent to April 18, 1966, the defendants filed a Motion for Hospital Records in which they prayed that the Court order the plaintiff to produce "Any and all records subsequent to August 6, 1965 of the Portsmouth Naval Hospital." (A. Vol. I., pp. 19-20). In the seven months between

September 11, 1967, and the date of trial, April 16, 1968, the plaintiff made no request of the Portsmouth Naval Hospital for her record subsequent to August 6, 1965. (A. Vol. I., pp. 41-42).

If this record had been produced at the time of trial, the missing pages of the Portsmouth Hospital Record would have directly contradicted the plaintiff's testimony on the extent of her disability. The plaintiff testified at the time of trial that she was required to wear a Thomas collar six to eight hours a day. (A. Vol. II, p. 149). She also gave the following testimony:

> Q. I see. Now, what happens to you when you don't wear the collar? What happens to your neck?
> A. I have — It hurts me. I cannot move it and that, and if I am not wearing the collar I have to hold my chin to keep — because it is so sore that without some kind of brace or something on it, I have to hold my chin here like this or something if I am not wearing the collar.
> (A. Vol. II, pp. 148-149)

A doctor called by the plaintiff, who had examined her for the first time on April 17, 1968, testified that motion in her neck was limited to 20-50% of the normal range of motion (A. Vol. II, p. 253.)

The entire Portsmouth Hospital record for the period April, 1965 — April, 1968 disclosed twenty-two outpatient visits by the plaintiff and two inpatient visits. (A. Vol. III, pp. 681-738). Nowhere in the entire record for this three year period is there any complaint of the type described by the plaintiff and her doctor at the trial. On the contrary, the record contains the following descriptions of her history and condition during her inpatient visits:

3-3-66 P.E.

> Physical examination on admission revealed a slightly thin, middle aged Caucasian female *in no distress. The remainder of the physical examination was within normal limits* except for heavy scarring along the anterior aspect on the left side of the neck, in the region of the previous thyroid incision. *There were no nodes palpable.* (A. Vol. III, p. 714)
> (Emphasis Added)

3-25-67 P.E.

> Physical examination revealed well developed, well nourished, white female, who was alert, cooperative and clinically euthyroid with a healed thyroid anterior neck incision. *There was no evidence of palpable nodes in the neck or supraclavicular areas. No thyroid gland was palpable.* The extremities revealed full range of motion of all fingers with a minute hard, immobile, tender, pointed projection on the radical aspect of the volar surface of the base of the proximal phalanx of the right fourth finger. (A. Vol. III, p. 716) (Emphasis Added.)

During the two inpatient visits, the plaintiff received constant nursing care and attendance for a total of seven days. Yet there is no mention of a Thomas collar or of any limitation or pain in the neck. Nor did the medical history which she gave mention the accident on October 18, 1963. (A. Vol. III, pp. 714, 716). These records are even more significant

when it is remembered that the plaintiff was being treated at the Portsmouth Hospital for a cancer of the thyroid gland in the neck. Thus, the examinations of the neck to detect the presence of any new cancer would have disclosed the limitations of motion and pain in the neck which the plaintiff described. The doctor even palpated her neck for other cancerous nodes without evoking any evidence of discomfort.

It is because the Portsmouth Hospital record so strongly contradicted the testimony of the plaintiff, that the Court of Appeals ordered a new trial on the issue of damages. This decision was the only fair and just one under the circumstances.

2) The plaintiff argues that the Defendants did not use due diligence in attempting to obtain the Portsmouth Hospital record. The argument overlooks the fact that the Defendant brought one motion for production of these records and, when only partial records were produced, brought a second motion which was allowed. (A. Vol. I. pp. 18-20). Once the second motion was allowed on September 11, 1967, the Defendants could reasonably expect that the Plaintiff would comply with the order of the Court. The Defendants were led to believe that the Plaintiff was making every effort to comply with this order and the Defendants objected when ordered to go to trial without these records. (Transcript of Hearing on Defendants' Motion for New Trial, pp. 8-9)

In determining whether a party has exercised due diligence, the actions of the opposing party are relevant. *Edgar* v. *Finley,* 312 F.2d 533 (CA 8th, 1963). In that case the Plaintiff's answers to the Defendant's interrogatories were misleading. In the present case, the Defendants were led to believe that the Plaintiff would produce the complete Ports-

mouth Hospital records. (Transcript of Hearing on Defendant's Motion for New Trial, pp. 8-9). It is ironic that the Plaintiff now argues that the Defendants should not have accepted the Plaintiff's word, but should have deposed the hospital or summoned in the records themselves. The Plaintiff was under an obligation to the Court and to the Defendants to comply with the Court's order of September 11, 1967. The Defendants could reasonably rely on the statements of Plaintiff's counsel that the Plaintiff would comply with this order. Due diligence did not require more of the Defendants.

The cases cited by the Petitioner do not establish a different standard from the one used by the First Circuit. In each case the Court decided whether the party used due diligence under all circumstances. There is, therefore, no conflict between the First Circuit and other Circuits.

3) The petitioner claims that the Court of Appeals incorrectly placed the burden of proof upon the Plaintiff in three instances. These contentions are not supported by the record.

First, the Court of Appeals accepted the statements of Defendant's counsel that a continuance had been requested. (Transcript of Hearing on Defendant's Motion for New Trial, pp. 8-9). These statements were made in the presence of Plaintiff's counsel and the Trial Court, and were not contradicted by either. They were sufficient evidence to support the finding that Defendants' counsel objected to going to Trial without the complete Portsmouth Hospital records.

Second, the Plaintiff now argues that the Defendants must prove that they did *not* have the Portsmouth Hospital record. This implies that the Defendants had somehow procured this record prior to trial, and did not use it at the time of trial. This position is contradicted by the letter

from LCDR. Kemp, which says that only one request was received for this record. (A. Vol. I pp. 41-42). Nor does the Plaintiff suggest how the Defendants could have obtained the Plaintiff's hospital record from an out-of-state Navy Hospital without written authorization of the Plaintiff.

Finally, it should be noted that this argument was pressed by Plaintiff's counsel before the Court of Appeals (Opinion of the Court of Appeals, p. 4). In those arguments Plaintiff's counsel claimed that references in the record proved that the Defendants had the entire Portsmouth Hospital record at the time of trial. The Court of Appeals continued the oral argument from the March to the April sitting, after oral arguments had been made in the March sitting, so that the Plaintiff could document this contention from the record. (Opinion of the Court of Appeals p. 4, footnote 3). Since the argument was raised by the Plaintiff as a basis for supporting the judgment in her favor, the Plaintiff had the burden or supporting the argument with references to the record. She was unable to do so then, and has not done so now.

Third, Plaintiff's counsel say that they tried in good faith to procure the Portsmouth Hospital Record. However, the letter referred to by the Plaintiff indicates that the subpoena was issued on April 15, 1968. (A. Vol. III p. 793). *This was one day before trial began.*

The Court of Appeals understood the subpoena procedure as well as the trial Court. However, it decided that Plaintiff's counsel had not done what was reasonable to comply with the Court's order of September 11, 1967, that Defendant's counsel had used due diligence in attempting to obtain these records, and that the failure of the Plaintiff to produce these records was prejudicial to the Defendants. These findings were fully supported by the record.

Conclusion

For the reasons stated above, the Court should deny the Petition for Writ of Certiorari.

STANLEY M. EPSTEIN

With him on the Brief:
THOMAS B. ARNOLD
EPSTEIN, SALLOWAY & KAPLAN
GOODSPEED & STRAMONDO

APPENDIX A

Portsmouth Naval Hospital Record For Treatment From April 28, 1965 — August 6, 1965

Complete Record	*Introduced at Trial*[1]	*Missing Pages*
P. 701	P. 701	711
702	702	713
704 (729)	704 (729)	727
705	705	735
706	706	(4 pages)
707	707	
709	709	
711	726	
713	(8 pages)	
726		
727		
735		
(12 pages)		

1. These pages are designated Appellants' Supplemental Appendix and were transmitted by a letter dated 18 April 1966.

Portsmouth Naval Hospital Record For Treatment From August 7, 1965 — April 16, 1968.

Complete Record	*Introduced at Trial*	*Missing Pages*
pp. 696-700	None	All
703		
708		
712		
714		
716-722		
728		
737		
738		
(19 pages)		

TOTALS		
31 Pages	8 Pages	23 Pages